A

KHAIRUDDIN HASSAN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: M-05-27-2004]

C

16 NOVEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Appeal against conviction and sentence - Information leading to fact discovered - Admissibility of such information - Conduct of accused -*

D

Mens rea possession - Presumption of trafficking - Evidence Act 1950, s. 27 - Dangerous Drugs Act 1952, s. 37(d), (da)(vi)

CRIMINAL PROCEDURE: *Trial - Judge deciding question of fact - Force by police used on accused - Conflicting versions given by prosecution*

E

and defence - Specific finding of fact

CRIMINAL PROCEDURE: *Mens rea - Trafficking in dangerous drugs - Conduct of accused - Presumptions - Inferences from facts established*

F

EVIDENCE: *Information leading to fact discovered - Information given by accused - Whether admissible - Principles applicable - Evidence Act 1950, s. 27*

EVIDENCE: *Presumption - Drug trafficking - Element of actual*

G

possession and knowledge established without aid of presumption under s. 37(d) Dangerous Drugs Act 1952 - Applicability of presumption of trafficking under s. 37(da)(vi)

The appellant/accused, together with another person ('the driver'), was charged with the offence of trafficking 2660 grams of

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cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution, the trial judge ordered the accused to enter his defence on the trafficking charge. The driver was acquitted and discharged on the ground that no *prima facie* case had been established. At the close of the

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defence case, the accused was convicted and sentenced to death. This was his appeal against that decision. The facts of the case

were that two police officers, PW4 and PW8, were on surveillance when PW4 saw a Citroen car. There were two persons in the car, the driver and the accused. PW4 followed the car and when it stopped, PW4 used his car to block their car. The driver and the accused opened their car doors respectively. PW4 then shouted "police", and the driver fled to his right while the accused ran to his left. They were both later apprehended and brought back to the car and the accused, upon being questioned, gave information to PW4 that he kept three kilograms of ganja under his seat, on the left of the driver. PW4, pursuant to the accused's information, found a black plastic package ('exh. P8') containing the cannabis in question. The trial judge admitted the information under s. 27 of the Evidence Act 1950 ('s. 27 information'). It was submitted by counsel for the accused that the trial judge had wrongly admitted the s. 27 information as the police had used force on the accused. It was further argued that the accused's conduct did not demonstrate his knowledge in relation to the drugs found in the car and, thus, there was insufficient evidence of possession.

Held (dismissing the appeal, and affirming the conviction and sentence imposed by the High Court)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) On the issue of force on the accused, the trial judge had rejected the accused's evidence that he was kicked and punched by the police since the place of arrest was a public place. The conflicting versions given by the prosecution and the defence at the trial made it necessary for the trial judge, for good reasons, to accept one version and reject the other, based on the audio-visual advantage he had at the trial. There was no error in his approach of accepting the prosecution's version and rejecting that of the defence. *Goi Ching Ang v. PP* (dist). (paras 19 & 20)

(2) The trial judge, as alluded to above, had arrived at a specific finding of fact that the police had not used any force on the accused. The s. 27 information had led to the discovery of the drugs. The discovery was the direct cause of the information which related distinctly to the place of concealment of the cannabis under the accused's seat on the left of the driver and the accused's knowledge of it. The admissible information was the accused's information relating to the exact location of the cannabis and its subsequent discovery. The information

A supplied by the accused which led to the discovery of the cannabis was the information that the police had not previously learnt from other sources, and the knowledge of the fact was first derived from information supplied by the accused. The cause of the discovery was the information
B supplied by the accused and not the prior knowledge of the police. Hence, the information supplied by the accused was admissible, and the trial judge was correct in admitting it. *Francis Anthonysamy v. PP* (foll). (paras 22 & 23)

C **(3)** In view of the trial judge's finding (and in this court's view, correctly) that the accused was in custody and control of exh. P8 *ie*, in physical possession of it, the fact in issue was whether he had knowledge that exh. P8 contained the drugs. His act of attempting to run away clearly had a nexus to the
D fact in issue and gave rise to an inference that he had the knowledge that exh. P8 contained drugs. It was for the accused, not the court, to explain his conduct. The accused's story that he had never tried to run had been rejected, which the trial judge was entitled to do. The trial judge's finding that
E the accused was in possession of the drugs was consistent with the established case authorities. (paras 31 & 32)

(4) All the evidence adduced at the trial clearly gave rise to the inescapable inference that the accused had "*mens rea* possession" of exh. P8. There was no evidence to suggest
F otherwise. As the prosecution had established the element of actual possession and knowledge without the aid of the presumption under s. 37(d) of the Act, the presumption of trafficking under s. 37(da)(vi) of the Act was applicable since
G the weight of the cannabis (2660 grams) for the charge was more than the statutory trigger of 200 grams. (paras 38 & 39)

(5) The trial judge had carefully considered the evidence of the prosecution and the defence without any error on his part. The accused's appeal was, therefore, devoid of merits.
H (para 40)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/tertuduh, bersama-sama seorang lain ('pemandu'), telah
I dituduh dengan kesalahan mengedar 2660 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada penghujung kes pendakwaan, hakim perbicaraan mengarahkan tertuduh memasukkan pembelaannya atas tuduhan mengedar itu.

Pemandu telah dibebaskan dan dilepaskan atas alasan bahawa kes *prima facie* tidak dibuktikan. Pada penghujung kes pembelaan, tertuduh telah disabit dan dikenakan hukuman mati. Ini adalah rayuannya terhadap keputusan itu. Fakta-fakta kes ini adalah bahawa dua pegawai polis, PW4 dan PW8, sedang menjalankan pengawasan apabila PW4 nampak sebuah kereta Citroen. Terdapat dua orang dalam kereta itu, iaitu pemandu dan tertuduh. PW4 mengekori kereta itu dan bila ia berhenti, PW4 menggunakan keretanya untuk menghalang kereta mereka. Pemandu dan tertuduh membuka pintu kereta mereka masing-masing. PW4 kemudiannya menjerit "polis", dan pemandu lari ke arah kanannya sementara tertuduh lari ke arah kirinya. Mereka berdua selepas itu diberkas dan dibawa balik ke kereta itu dan tertuduh, setelah disoal, memberi informasi kepada PW4 bahawa beliau menyimpan tiga kilogram ganja di bawah tempat duduknya, di sebelah kiri pemandu. PW4, melalui informasi tertuduh, menjumpai suatu pakej plastik hitam ('eks. P8') yang mengandungi kanabis berkenaan. Hakim perbicaraan menerima informasi itu di bawah s. 27 Akta Keterangan 1950 ('informasi s. 27'). Ia telah dihujah oleh peguam tertuduh bahawa hakim perbicaraan telah khilaf apabila menerima informasi s. 27 kerana polis telah menggunakan kekasaran ke atas tertuduh. Ia lagi dihujah bahawa kelakuan tertuduh tidak membuktikan pengetahuannya mengenai dadah yang dijumpai dalam kereta itu dan, oleh itu, tidak ada keterangan milikan yang mencukupi.

Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Berhubungan isu kekasaran yang dilakukan ke atas tertuduh, hakim perbicaraan telah menolak keterangan tertuduh bahawa beliau telah ditendang dan ditumbuk oleh polis kerana tempat penangkapan merupakan satu tempat awam. Versi-versi bercanggah yang diberi oleh pendakwaan dan pembelaan di perbicaraan itu telah menyebabkannya perlu untuk hakim perbicaraan, bagi sebab-sebab yang betul, untuk menerima satu versi dan menolak yang lagi satu, berdasarkan kelebihan pandang dengar yang beliau ada pada perbicaraan itu. Tidak ada kekhilafan dalam pendekatannya menerima versi pendakwaan dan menolak versi pembelaan. *Goi Ching Ang v. PP* (dibezakan).

(2) Hakim perbicaraan, seperti yang disebut di atas, telah membuat suatu dapatan fakta yang spesifik bahawa polis tidak menggunakan apa-apa kekasaran ke atas tertuduh. Informasi s. 27 telah membawa kepada penemuan dadah itu. Penemuan itu disebabkan secara langsung oleh informasi yang berkaitan secara nyata kepada tempat penyembunyian kanabis itu di bawah tempat duduk tertuduh di sebelah kiri pemandu dan pengetahuan tertuduh tentangnya. Informasi yang boleh diterima ialah informasi tertuduh berhubungan dengan lokasi tepat kanabis itu dan penemuan berikutnya. Informasi yang diberi oleh tertuduh yang telah membawa kepada penemuan kanabis itu adalah informasi yang polis sebelum itu tidak mendapat dari sumber-sumber lain, dan pengetahuan akan fakta itu telah pertamanya didapati dari informasi yang diberi oleh tertuduh. Apa yang menyebabkan penemuan itu ialah informasi yang diberi oleh tertuduh dan bukan pengetahuan sebelum itu polis. Oleh yang demikian, informasi yang diberi oleh tertuduh boleh diterima, dan hakim perbicaraan adalah betul apabila menerimanya. *Francis Anthonysamy v. PP* (diikuti).

(3) Memandangkan dapatan hakim perbicaraan (dan dalam pandangan mahkamah ini, dengan betul) bahawa tertuduh mempunyai jagaan dan kawalan eks. P8, iaitu, mempunyai milikan fizikal atasnya, fakta persoalan ialah sama ada beliau mempunyai pengetahuan bahawa eks. P8 mengandungi dadah itu. Tindakannya untuk cuba melarikan diri jelas mempunyai hubungan kepada fakta persoalan dan membangkitkan sesuatu inferens bahawa beliau mempunyai pengetahuan yang eks. P8 mengandungi dadah itu. Ia adalah untuk tertuduh, bukan mahkamah ini, untuk menerangkan kelakuannya. Cerita tertuduh bahawa beliau tidak pernah cuba lari telahpun ditolak, yang mana hakim perbicaraan berhak berbuat. Dapatan hakim perbicaraan bahawa tertuduh mempunyai milikan dadah itu ialah konsisten dengan autoriti-autoriti kes yang mantap.

(4) Semua keterangan yang dikemukakan di perbicaraan nyata membangkitkan inferens yang tidak dapat dielakkan bahawa tertuduh mempunyai "milikan *mens rea*" eks. P8. Tidak ada keterangan untuk mengatakan sebaliknya. Oleh kerana pendakwaan telah membuktikan elemen milikan sebenar dan pengetahuan tanpa menggunakan anggapan di bawah s. 37(d) Akta, anggapan mengedar di bawah s. 37(da)(iv) Akta boleh

digunakan kerana berat kanabis (2660 gram) untuk tuduhan tersebut merupakan lebih daripada pencetus statutori 200 gram.

(5) Hakim perbicaraan telah menimbangkan dengan teliti keterangan pendakwaan dan pembelaan tanpa melakukan apa-apa kekhilafan. Rayuan tertuduh, oleh itu, tiada merit langsung.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 ***(refd)***
Chong Soon Koy v. PP [1977] 1 LNS 20 ***(refd)***
Director of Public Prosecutions v. Brooks [1974] 2 All ER 840 PC ***(refd)***
Francis Anthonysamy v. PP [2005] 2 CLJ 481 SC ***(foll)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(dist)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Chin Moi Moi [1995] 1 SLR 297 ***(refd)***
PP v. Foo Jua Eng [1965] 1 LNS 137 ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***
San Soo Ha v. PP [1967] 1 LNS 155 ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a), (2)
Evidence Act 1950, ss. 24, 27

Other source(s) referred to:
Stephen's Digest, 9th edn, p 304

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - How May Ling DPP

[Appeal from High Court, Melaka; Criminal Trial No: 45-3-2001]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] Together with another person, the appellant ("the accused") was charged with the offence of trafficking 2660 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952

and punishable under s. 39B(2) of the same Act. (For brevity and convenience, a reference to a section hereinafter is a reference to that section in the Dangerous Drugs Act 1952 unless the context otherwise requires).

[2] At the close of the case for the prosecution, the learned trial judge ordered the accused to enter his defence on the trafficking charge. The other person ("the driver") was acquitted and discharged, on the ground that no *prima facie* case has been established.

[3] At the close of the defence case, the accused was convicted and sentenced to death. Hence, this appeal by the accused.

[4] On 11 August 2009, we dismissed the appeal. We now give our grounds.

Case For Prosecution

[5] At the close of the case for the prosecution, the narrative of the trial judge's finding of facts may be unfolded as follows.

[6] On 7 August 2001, at about 11pm, Chief Inspector Mohd Fared bin Abdul Aziz (PW4) and Detective Corporal Abdul Razak bin Majid (PW8), acting on information received, were on surveillance in the area near Flat Sri Siantan Melaka. PW4 saw a Citroen car bearing registration number BDX 6007 ("the Citroen car"). There were two persons in the Citroen car *viz* the driver, and next to the driver was the passenger who was the accused.

[7] PW4 followed the Citroen car for about 20 minutes until it stopped at the car park of Pusat Rawatan Al-Baqarah nearby. PW4 used his car to block the Citroen car at the rear. The driver and the accused opened their car doors respectively. PW4 then shouted "police". The driver fled to his right, while the accused ran to his left. Both of them were later apprehended about 25 feet away and brought back to the Citroen car. A question and answer session ensued between PW4 and the accused. PW4 recorded his questions and the accused's answers in his note book. Pursuant to the question and answer session, the accused gave the information that he (the accused) kept three kilograms of ganja near his feet under the accused's seat, on the left of the driver. This information, recorded by PW4 in his note book, was tendered as exh. P21A. The learned trial judge admitted the information under s. 27 of the Evidence Act 1950 ("s. 27 information").

[8] The accused led PW4 to the front door on the left side of the car and pointed to a black plastic package tied in a knot at the top (exh. P8) situated at the foot well of the passenger seat next to the driver. Inside the bag were three transparent plastic bags (exhs. P10, P13 and P16). Inside each of the plastic bags respectively was a slab of cannabis wrapped in transparent plastic. The drugs, as analysed by the chemist (PW2), contain 2660 grams of cannabis.

[9] A cautioned statement, recorded from the accused on 12 August 2001, also contained the s. 27 information. The cautioned statement was admitted as exh. P38, after a trial within a trial.

Defence Case

[10] The accused's statement from the dock was tendered and marked as exh. D40. The accused stated that he travelled with the driver to Melaka to collect a debt from a friend. When he boarded the Citroen car, there was nothing on the passenger seat or on the floor. He denied running away when the police accosted him, and the police never introduced themselves. He added that the black plastic bag was recovered from the car boot and was planted by the police at the foot well of the passenger seat. He denied pointing out the drugs to the police. He also denied giving a cautioned statement to the police on 12 August 2001.

[11] The accused called one Zahurim as DW1 and the driver as DW2. DW1 testified that he borrowed the Citroen car at about noon that day. DW1 met with a person named Man who asked DW1 to deliver the black plastic bag to one Ganesh at 9pm. Man told DW1 that the black plastic bag contained rokok keretek Gudang Garam (cloves cigarettes). Man placed the bag in the car boot, and gave Ganesh's telephone number to DW1 for DW1 to contact and meet Ganesh who would give DW1 RM100 as the fee when Ganesh received the black plastic bag. DW1 then went home to sleep.

[12] DW2 testified that when he went to DW1's house at about 7pm to take the Citroen car, DW1 had forgotten about the black plastic bag in the boot, and only informed DW2 later of his (DW1's) meeting with Man. DW2 said that when he took the car from DW1 in order to accompany the accused to Melaka, there

A was nothing on the passenger seat or on the foot well, and that the police who had opened the car door apprehended him immediately.

Section 27 Information

B **[13]** Learned defence counsel Mr Karpal Singh (assisted by Mr Ramkarpal Singh) submitted that the learned trial judge had wrongly admitted the s. 27 information, as the police had used force on the accused. They cited *Goi Ching Ang v. PP* [1999] 1 CLJ 829 FC in support thereof.

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[14] Ms How May Ling, learned deputy public prosecutor, subscribed to the view that the s. 27 information has been rightly admitted by the learned trial judge.

D **[15]** Section 27 merits reproduction as follows:

> When **any fact** is deposed to as **discovered** in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, **whether such information amounts to a confession or not, as relates**
> E **distinctly to the fact thereby discovered** may be proved. (emphasis added)

[16] Section 27 has been judicially considered in a long line of authorities. Illustrations include:

F (1) *San Soo Ha v. PP* [1967] 1 LNS 155 where Raja Azlan Shah J (as HRH then was) applied the established law that such words as 'I have concealed,' 'I have hidden', 'I have kept' are admissible in evidence under s. 27;

G (2) *Chong Soon Koy v. PP* [1977] 1 LNS 20 where Suffian LP (as he then was) spoke for the Federal Court and explained that under s. 27, "the fact discovered" embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this. His Lordship highlighted
H that the "information" supplied by the accused "relating distinctly to the fact thereby discovered" was "information with regard to a firearm and the ammunition which he had hidden in the Berapit Hills in Bukit Mertajam". All that evidence was held admissible under s. 27;

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(3) *PP v. Chin Moi Moi* [1995] 1 SLR 297 HC, Yong Pung How CJ (Singapore) held that the words "whether such information amounts to a confession or not" clearly indicate that "information" is not only limited to a statement by the accused but also acts or conduct of the accused which relate distinctly to the fact discovered including acts like pointing out the place where an article is hidden or where the accused leads the police to that article; and

(4) *Francis Antonysamy v. PP* [2005] 2 CLJ 481 where the Federal Court through the judgment of Augustine Paul JCA (now FCJ) at p. 498 para d and h held that s. 27 is independent and is not subject to the voluntariness rule in s. 24 of the Evidence Act 1950 or for that matter any other statutory provision regulating the manner of taking or recording statements from any person. His Lordship emphasized that this is illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s. 27.

[17] It is abundantly clear to us that as a general rule, the issue of voluntariness is not a condition precedent for the admission of a s. 27 information.

[18] Be that as it may, by way of an exception, we are mindful of the principle that a s. 27 information which has been found to be involuntary may be excluded by the Court in the exercise of its discretion, the exercise of which must depend on the facts and circumstances of each particular case. The accused being the party seeking to have the s. 27 information excluded in the exercise of the discretion bears the onus of showing, on a balance of probabilities, that the discretion should be exercised in his favour. The circumstances of involuntariness must indeed be extraordinary in order to exclude the s. 27 information which in the first place does not affect its admissibility in law: see *Francis Antonysamy, supra*, pp 499 d and 501 f, applying *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814 HC.

[19] On the issue of the use of force on the accused, the learned trial judge had rejected the accused's evidence that he was kicked and punched by the police, as the place of arrest was a public place.

[20] We are of the view that the conflicting versions given by the prosecution and the defence at the trial make it necessary for the learned trial judge, for good reasons, to accept one version and reject the other, based on the audio visual advantage he had at the trial. We are unable to identify any error in his approach in accepting the version of the prosecution and rejecting the defence version.

[21] *Goi Ching Ang, supra*, on which the defence relies, is readily distinguishable on the facts in that one or two days after the accused was arrested, he was blindfolded and brought together with another person to his rented house. After the blindfold was taken off, he saw laying out on the floor of the sitting room pistols and ammunition which he denied ever telling PW5, a senior police officer, that he had agreed to show PW5 where he kept them, and that he had no knowledge of the firearms and the ammunition seized from the house. The Federal Court speaking through Chong Siew Fai CJ (SS) (as he then was) exercised the discretion to exclude the s. 27 information.

[22] In the instant appeal, as alluded to above, the learned trial judge has arrived at a specific finding of facts that the police had not used any force on the accused. The s. 27 information has led to the discovery of the drugs. The discovery was the direct cause of the information which relates distinctly to the place of concealment of the cannabis under the accused's seat on the left of the driver and the accused's knowledge of it. The admissible information is the accused's information which relates to the exact location of the cannabis and its subsequent discovery. The information supplied by the accused which led to the discovery of the cannabis is the information which the police had not previously learnt from other sources and the knowledge of the fact was first derived from information supplied by the accused. The cause of the discovery was the information supplied by the accused and not the prior knowledge of the police. Hence the information supplied by the accused is admissible as the information that the police had no prior knowledge: *Francis Antonysamy, supra*, at p. 503 FC.

[23] In our view, the learned trial judge was correct in admitting the s. 27 information.

Conduct Of Accused

[24] It was argued for the defence that the conduct of the accused does not demonstrate accused's knowledge in relation to the thing found at the foot well of the driver's seat in the car and so there was no sufficient evidence of possession.

[25] The prosecution contended that actual possession had been established against the accused and that the weight of cannabis being in excess of 200gm, the presumption of trafficking under s. 37(da)(vi) is triggered.

[26] The learned trial judge specifically found that there was *mens rea* possession, even without resorting to the s. 27 information. The learned trial judge said: "The conduct of the accused in attempting to run away even before the discovery of the drugs when approached by PW4 clearly gives rise to an inference that he had prior knowledge of the existence of the drugs."

[27] The above factual background is strikingly similar to the factual situation in *Director of Public Prosecutions v. Brooks* [1974] 2 All ER 840 PC. This is the advice of the Privy Council after hearing an appeal from the Court of Appeal of Jamaica. The concise facts and decision appear in the head note. They merit reproduction as follows:

> Some police officers saw a van parked, with its engine running, in a lay-by at Braco, Jamaica. The respondent was occupying the driver's seat and there were several other people in the cab. When the officers hurried towards the van, the occupants scrambled out and ran off. The respondent was caught by the officers. Inside the body of the van, which was neither visible nor accessible from the cab itself, the police found 19 sacks containing a total of more than 1,000 lbs of ganja. When questioned by the officers, the respondent said that he had been employed by R and had been told to drive the van, loaded as it was, to Braco. When asked whether he knew what was in the sacks, the respondent made no reply. The respondent was charged with, and convicted of, unlawfully having in his possession ganja, contrary to s. 7(c) of the Dangerous Drugs Law of Jamaica. He appealed to the Court of Appeal of Jamaica, which quashed the conviction on the ground that he, as R's servant, merely had custody of the van and the contents, and that was not enough to constitute 'possession'.

A Held – The appeal would be allowed and the conviction restored, for (i) a person had possession of a dangerous drug, within s. 7(c), if, to his knowledge, he had the drug in his physical custody or under his physical control, and (ii) on the evidence the respondent had in his physical custody and control the 19 sacks of ganja and from the evidence it could be inferred that he knew what he was carrying in the van.

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[28] On the other hand, we are mindful of the judgment of the Federal Court in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 pertaining to drug trafficking under s. 39B(1)(a). There was C evidence of possible access to the house by others. It was held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even through he did not offer any explanation himself.

D **[29]** The Federal Court judgment in *Abdullah Zawawi, supra*, appears to be at variance with the Privy Council advice in *Brooks, supra,* demonstrating two different judicial approaches.

[30] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC, Augustine E Paul FCJ resolved these different approaches in the following passage:

> The difference in both the cases is that in *Abdullah Zawawi bin Yusoff* there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant F fact within the meaning of s. 8 (of the Evidence Act 1950) in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff* is therefore authority only to G this extent. On the other hand in *Deputy Public Prosecutor v. Brooks* there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away H by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9 (of the same Act) (Words in bracket added).

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[31] Reverting to the mainstream in the instant appeal, in view of the learned trial judge's finding (and in our view, correctly) that the accused was in custody and control of exh. P8 containing the drugs ie, in physical possession of it, the fact in issue is whether he had knowledge that the bag contained the drugs. His act of attempting to run away clearly has a nexus to the fact in issue and gives rise to an inference that he had the knowledge that the black plastic bag contained drugs. It is for the accused to explain his conduct and not for the court to offer one.

[32] The defence story that the accused had never tried to run had been rejected. The learned trial judge is entitled to do so. The learned trial judge's finding that the accused was in possession of the drugs in question is consistent with established authorities eg, *Chan Pean Leon v. PP* [1956] 1 LNS 17 where Thomson J applied the description of "possession" in *Stephen's Digest* (9th edn, p. 304) as follows:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[33] His Lordship in *Chan Pean Leon, supra,* elaborated:

> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an

A intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed.

B Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it C is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[34] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 Taylor J further explained as follows:

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… The word 'possession' is the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons. The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot E be possession but there can be possession without full and exact knowledge …

[35] In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 FC, the respondent was the only person in the car at the material time; F the drugs were found hidden under the driver's seat and front passenger seat and the car was in possession of the respondent for more than seven months prior to his arrest. In the circumstances, the Federal Court drew the irresistible inference that the respondent all along knew about the drug in the car and G that there was evidence of possession of the drug independent of s. 37(d).

[36] In *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264, 270, the Court of Appeal through the judgment of Abdul Aziz Mohamad H JCA held that:

(1) it was not for the court at the close of the prosecution case, to provide a defence for the appellant and speculate on the probability that, for example, someone else had left the bag in the appellant's car without his knowledge. Unless there were I elements in the evidence of the prosecution case itself pointing to such probability, it must not be entertained;

(2) the inescapable inference from the fact that the bag was so placed in relation to the appellant in the car as has been described can only be that he knew of the existence of the bag. From the fact that he allowed the bag to remain there while he was driving, the inescapable inference is that he willed the bag to be there in order to guard it and that therefore he was in custody and control of it.

[37] In *PP v. Foo Fua Eng* [1965] 1 LNS 137, Raja Azlan Shah J (as HRH then was) ruled that the conduct of the accused in trying to close the door on PW1 (police officer) and the physical proximity of the accused to the drugs proved the element of possession.

[38] We are of the view that in the instant appeal, all the evidence adduced at the trial clearly gave rise to an inescapable inference that the accused had '*means rea* possession' of the packages containing the cannabis. All the evidence gave rise to a strong inference that the accused was in possession with knowledge of the contents of the packages. At this point, there was no evidence to suggest otherwise. The known facts support such an inference.

[39] As the prosecution had established the element of actual possession and knowledge without the aid of the presumption under s. 37(d), the presumption of trafficking under s. 37(da)(vi) is applicable as the weight of the cannabis (2660gm) for the charge was more than the statutory trigger of 200gm.

Conclusion

[40] The learned trial judge had carefully considered the evidence of the prosecution and the defence. We are unable to find any error on his part. In the circumstances, the accused's appeal, being devoid of merits, is dismissed. We therefore affirmed the conviction and sentence imposed by the High Court.